United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1448

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Appellee,

-v-

Docket No. 76-1448

SUSAN BRAUNIG,

Appellant.
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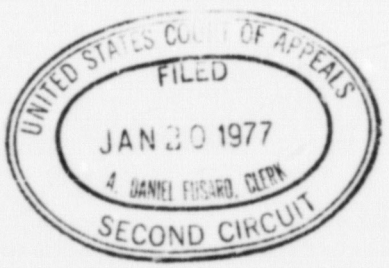
REPLY BRIEF FOR APPELLANT SUSAN BRAUNIG



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POINT I

THE SUFFICIENCY OF THE EVICTION NOTICE WAS ESSENTIAL TO THE DISTRICT COURT CONCLUSION. THE COURT ERRED IN ACCEPTING THE GOVERNMENT'S VIEW ON THAT ISSUE. THERE CAN BE NO WAIVER OF THE RIGHT TO CHALLENGE THE DISTRICT COURT ERRONEOUS LEGAL CONCLUSION.

The Government, as we shall show in answering its various arguments, must lose on the merits of the consent search. Faced with that, it turns to waiver. Its attempt thus to avoid the consequences of its illegal acts cannot stand analysis.

1. It was at all times (and is now GBr 23, footnote) a factual predicate on the consent search issue that neither Gardner nor Braunig received actual notice of the eviction. The legal predicate of the Government's position and the district court opinion was that they didn't need actual notice because the nail-

ing and mailing provision of N.Y.R.P.L. 735 followed by Mrs. Flanagan was constitutionally sufficient. Thus, the Assistant pointed out to the court in his oral statement (A 94): "Service of the petition was effected by nail and mail service since neither Mr. Gardner nor Miss Braunig were available at the apartment. And of course nail and mail service has been upheld in the Second Circuit in a case called Velasquez against Thompson, found at 451 F. 2d 202." See also GBr 19**. His Memorandum in Opposition reiterated that Sec. 735 nail and mail service "has been upheld against constitutional challenge on both due process and equal protection grounds by the Second Circuit Court of Appeals ", citing again the Velasquez case. Memorandum, p. 10*. The district court adopted that view in its opinion upholding the search (A84).

In those circumstances it made no difference whatever that defense counsel below did not call the notice point to the district court's attention in the specific terms we urge now. Somehow or other the court had to deal with the lack of actual notice which defense counsel was continually urging as grounds to invalidate the search. The court chose to adopt the Government's argument that the sufficiency of nailing and mailing took care of that. Since this was solely a question of law, and since the district court's view on that exclusively legal issue was an essential predicate to its conclusion, its erroneous holding is fully reviewable in this court.*

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* We did not learn until the Government's Brief that Braunig's former counsel in the district court made the August 12 remarks attributed to him at GBr 20. There was no transcript of that (cont'd)

2. The Government argues that Mrs. Flanagan acted reasonably (GBr 24). The Government concedes, however, that she "knew that Braunig and Gardner were not at the apartment when her process server made service of the notice of eviction" (GBr 23, footnote). Furthermore, the Government stated as part of its offer of proof that "there were numerous telephone conversations in 1975 and early 1976" between Myers and Flanagan (A 93). Not knowing exactly what was said, we took it both ways (DBr 13). If Myers told Flanagan where they were, her lack of effort to reach them was especially bad for due process purposes. If he didn't, she fared little better since she (or her attorney with whose negligence she is charged, GBr 23 footnote) could have found out so easily.**

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* (cont'd)
hearing until after the case was tried. Counsel who actually tried the case made no such concession, and his were the only ones which counted.

** A measure of the faith Mrs. Flanagan put in Myers concerning the Gardners is that she invited him to the eviction and then afterwards delivered Braunig's diary to him, allegedly unsolicited (A 85).

The suggestion that Braunig fled to Canada and therefore abandoned the apartment (GBr 31*) is nonsense. Braunig did not "flee" to Canada. She went there leaving all her personal effects in the apartment and clearly intending to return, but was apprehended. We will not dignify with response the Government's argument that because she went to commit a crime, that worked an abandonment Moreover, contrary to GBr 16-17*, the evidence of Myers' bad faith and misconduct is clear, even on this limited record (DBr 16-18).

Robinson v. Hanrahan, 409 U.S. 38 (1972) (GBr 24) indeed applies. There, the State instituted forfeiture proceedings against defendant's car and mailed notice thereof to his home address listed in the Illinois Secretary of State's office, all in accordance with the Illinois forfeiture statute. 409 U.S. 38 & n. 1. Defendant, however, as the State knew, was in the Cook County jail. The Supreme Court overturned the forfeiture because the notice was not reasonably calculated to apprise defendant of the forfeiture proceedings. In this case as well, no matter which assumption is made, the notice must be found to be defective (DBr 14-15).

3. The Government asserts that Braunig was a "month-to-month" tenant so that Mrs. Flanagan could peacefully regain possession even without a court proceeding. GBr 30-31*. New York Real Property Law 232-a is directly contrary. It requires first a thirty day notice to quit and then, we submit, a summary proceeding:

> "No ... tenant from month to month shall hereafter be removed from any lands or building in the city of New York unless at least thirty days before the expiration of the term the landlord or his agent serve upon the tenant, in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law, a notice in writing ... that the landlord elects to terminate the tenancy and that unless the tenant removes from such premises on the day on which his term expires the landlord will commence summary proceedings under the statute to remove such tenant therefrom."

That a summary proceeding indeed is the only remedy is made clear by comparing N.Y.R.P.L. 232-b, applicable to month to month tenancies outside New York City. It provides for termination

of these merely upon notification "one month before the expiration of the term of the [landlord's] election to terminate", with no mention of a summary proceeding. Liberty Ind. Park Corp. v. Protective Packaging Corp., 335 N.Y.S. 2d 333 (Sup. Ct. 1972) (GBr 31) is a 232-b case, and does not authorize self-help in a 232-a situation.

Even if the landlady had the right to self-help, she would have first had to give the requisite 30-day notice. The Civil Court file fails to reflect any 232-a notice, and the Government did not show any such notice in the court below.*

4. The Government argues that Myers did not act unreasonbly in relying on Mrs. Flanagan's consent since she had apparent authority to give it (GBr 32). In United States v. Hughes, 441 F. 2d 12 (5th Cir. 1971) which the Government cites, the Court held that defendant had "no property rights in the press room" searched, 441 F. 2d at 18, and there was no question that the owner had the right to consent to the search. Apparent authority had nothing to do with the decision.

In any event Chapman v. United States, 365 U.S. 610 (1961) (DBr 12) completely disposes of this argument. In Chapman the landlord detected the order of illicit whiskey from the tenant's house and called officers to search. The Supreme Court held that the search consent was illegal because the landlord had no rights under Georgia law to the premises and therefore could not validly consent to the search.

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* Any termination notice, moreover, served at the apartment pursuant to Sec. 735 would have been invalid for the same reasons as the eviction notice.

Justice Clark dissented. He thought the officers were entitled to rely on the landlord and that made the search reasonable. 365 U.S. at 622. Justice Frankfurter also thought the police could rely on the landlord, advancing the same reasoning the Government does here (GBr 32) with respect to "charging a policeman with knowledge of the local law relating to landlord and tenant" and "knowledge of the law of Georgia regarding the power of a landlord to abate a nuisance in his house." 365 U.S. at 618-19.

The reasoning of Justices Clark and Frankfurter was not accepted by the Court itself, was not the law after Chapman was decided, and (as the absence of pertinent citation in the Government's Brief makes clear) is not the law now.*

5. The Government cites a series of cases for the proposition that even if Flanagan acted illegally, her conduct is not imputable to the Government. GBr 33, footnote continued from GBr 32. Those cases are each private party search cases, that is, where a private party conducts the search, seizes the evidence and then turns it over to the Government. Here the Government made the

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* United States v. Matlock, 415 U.S. 164 (1974) (GBr 32) supports us, not the Government. There the Supreme Court refused to adopt the Government's position that reasonable belief in the authority of the third party was enough to validate a consent search (415 U.S. at 177 n. 14). Instead the Court remanded for the district court to consider whether the Government had met its burden of showing that there was indeed a legally sufficient basis for the consent.

search and seizure, and the landlady comes into the picture only as the basis of consent. The cited cases, therefore, have nothing whatever to do with this one.*

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* We have responded here to only some of the Government's many misstatements and errors. Enough, however, for this Court to see that its contentions are meritless and that the search was plainly invalid.

POINT II

THE GOVERNMENT FAILED TO SUPPLY ANY CONNECTION BETWEEN THE BANK OF ALBANY ACT AND BRAUNIG WHICH WOULD HAVE MADE THAT ACT ADMISSIBLE.

No matter how extensive its recitation of facts to show generally that Braunig was mixed up with Gardner (GBr 43), the Government still has brought forth nothing beyond the fact that the phony certification was in the desk drawer of the joint apartment (GBr 42-43) to link Braunig specifically to the Bank of Albany scheme.* Similar act evidence must at least encompass competent proof that defendant committed a criminal act. Here there was no such proof. United States v. Vosper, 493 F. 2d 433 (5th Cir. 1974) (DBr 22-23) is pertinent, whether the approach be "exclusionary" or "inclusionary" (GBr 44*), because its states this basic fundamental which the Government still fails to grasp.

The error is not saved because the district court left the jury free to either draw or not draw the connection, as it saw fit (GBr 44-45; DBr 23; A107). Since the Government's evidence failed to establish the connection, the jury had no role to play and no business hearing the evidence at all (DBr 23). The error

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* The Eric Thomas checkbook was also in the drawer (GBr 43) but since there was no way Braunig could ascertain anything illegal from that, it did not help the Government.

The Government urges that the Bank of Albany fraud was admissible because it showed a similar act of Gardner, one of the schemers. (GBr 41-42**). It did not come in with any such limited purpose. It was admitted as a similar act against Braunig, as the Government recognizes by even now seeking to sustain on that basis.

was anything but harmless (GBr 45*) not only because it had inherently to prejudice but because of the Assistant's repeated references to the Bank of Albany forgeries in summation (DBr 27).

POINT III

THE SEIZED EVIDENCE AFFECTED ALL PHASES OF THE GOVERNMENT'S CASE. ITS ADMISSION WAS NOT HARMLESS.

We find the Government's harmless error discussion distressing.

In the first place how can the Government say that "As shown in the statement of facts", there was overwhelming proof against Braunig (GBr 46) when the Government's statement of facts fails to set forth the testimony of the six defense witnesses (GBr 14)? If the Government discusses factual issues it has at least an obligation to show defendant's side of the case as well. Earle, for example, confirmed that in 1973 (long before any alleged credit card frauds) Braunig was calling herself Susan Gardner (981-82). Carl York, the national traveling representative for Actors Equity for the past eight years, testified that he met Braunig in 1969 when she was with the Fantasticks (994); that he told her then that she should change her name for theatrical reasons (995); that there was a Sue Gardner on file with Actors Equity which would have prevented Braunig from getting that name (988, 991); and that sometimes even a non-dues paying member could get a change of name (997). Chefetz, testifying as an expert in the employment

agency field (1017), said that administrative assistant could mean anyone who did anything in an office (1018). Vogelson knew Gardner and Braunig in 1972 and knew from 1973 that they were already living together and holding themselves out as Mr. and Mrs. Gardner (1038). Carr, who was in the Fun Tyme transaction as attorney for the Swiss Bank, showed that he considered the transaction legitimate, so that Braunig could have too. And Berger, who handled a civil suit against Braunig arising out of the two forged Barclay's checks, showed that the bank had been prepared to and had entered into an agreement to settle the suit (1011).

Thus, drawing on Earle's and Vogelson's testimony that Braunig was devoted to Gardner and held herself out as his wife long before the alleged credit frauds, the jury could easily have found that she did not adopt the name to defraud department stores, as Count 13 charged (DBr 4). Drawing on York's testimony that he had suggested a name change in 1969, that the registration to Sue Gardner would have prevented Braunig from taking that name, and that Actors Equity might register S. M. Gardner even if Braunig had not paid her dues, the jury could have rejected the part of the perjury count based on the name change; thrown out conflicts between bank officers and Braunig's grand jury testimony (DBr 5) on the basis that bank officers handle thousands of transactions daily and can not remember exact details of conversations about small accounts which occurred years ago; and found the other alleged falsehoods too trifling to be any-

thing but misunderstandings or inadvertence (for example, that a "secretary" lied when she said she was an "administrative assistant"). Finally, drawing on Carr's showing that Braunig was not acting fraudulently in Fun Tyme where she was merely an errand girl for Gardner; applying the errand girl role to the Barclay's fraud; and joining that to Berger's testimony that the Bank itself thought so little of her participation that it entered into a settlement agreement, the jury could well have found that the fraud on counts 5 and 6 was Gardner's only, and that Braunig had been used by him in it.

Second, we have reviewed each of the harmless error cases cited by the Government (GBr 45-46). In not a single one was the principal issue whether the acts in question were committed unknowingly, inadvertently or negligently, as was the issue here. Because that was the issue, moreover, the evidence had to be circumstantial, as the Government itself concedes in footnote page 47: "numerous other bricks of circumstantial evidence". In United States v. Ong, 2d Cir. September 27, 1976, cert. applied for, this Court could find guilt beyond a reasonable doubt as to defendant Young because the tapes of defendant's conversations with Immigration agents showed he was bribing them, and no reasonable juror could say otherwise. The evidence which should not have been admitted made no difference in that regard. Here however, it was the illegal evidence which tipped the scales on the guilt. Otherwise the evidence left room for conflicting inferences, and the jury could just as well have resolved those

in Braunig's favor.

Third, there is no truth to the Government's suggestion that the apartment search added nothing to the perjury count (GBr 46-47*)*. The Government wanted her note on the bill of particulars that she had "evaded", not "perjured" before the jury so it could argue that Braunig was conscious of her lies (A 135: "look at how much she herself admits in that note"). It succeeded in the argument. How can it now be heard to say the evidence "indeed, could well have been viewed as exculpatory" (GBr 46*)?

What about the "partner in crime" material, which, the Assistant argued, "clearly ring[s] out a message", "clearly and succintly admit[s] her guilt, her confederation with Michael Gardner in their joint criminal enterprises." (A 135). The Assistant never told the jury it was not to consider that on the perjury count. It was indeed the most damaging evidence he had --specifically on the claim that she had lied about the Penguin Products partnership (GBr 47*, DBr 5) and generally on her intent to perjure to protect the criminal activities of Gardner. It infected in fact every one of the counts and was even relied on by the district court in the decision to impose a two year jail sentence. Tr. 1288:

> "It's been suggested by several letterwriters and by Miss Braunig herself in letter form that she has been

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* In the face of our showing of the major role the seized evidence played (DBr 27), the Government could not dare make the same argument on the other counts. There is no merit to it on the perjury count either.

a victim of circumstances, that she was merely the unwitting handmaiden of Michael Gardner.

" The Court believes that any inclination to be so persuaded must yield in light of the number of factors in the case, and I will single out but two. The first is Miss Braunig's statement in her writing that she saw herself as a 'partner in crime' with Michael Gardner."

Fourth, where the Assistant has made such extensive reference on summation to the seized evidence (DBr 27), we think the Government should at least address United States v. Durant, 2d Cir. November 24, 1976 (DBr 28) in which this Court reversed because of the district court's failure to appoint a fingerprint expert for the defense exactly because the Assistant made several references on summation and rebuttal to the fingerprint question. Slip Op. p. 638-39. In our view the wealth of the seized material and its highly probative value (DBr 24-26) when coupled with the extensive use the Assistant made of it (DBr 27) and read against Durant, show the Government's harmless error point to be frivolous.*

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* It is always ironic to see the Government going to such lengths to convince the district court that the disputed evidence must come in; spending hours and sometimes days of trial time putting that evidence in before the jury; and arguing vigorously that it is the vital link which puts together the Government's case (e.g., A 133); only to assert in this Court that the evidence was not prejudicial and never needed in the first place because its other proof was so overwhelming. "Harmless error" clearly has no role to play in such a case.

Respectfully submitted,

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